

# Government Accountability for Causing Individuals Harm



**POLICE LINE DO NOT CROSS**

## SUMMARY

Should a person be held liable for damages if they harm you? The answer is a resounding yes. However, while individuals can hold one another accountable in court, the government is held to a far lower legal standard than any private individual—if it's held to one at all. This is because in many cases, the state shields itself from being held liable for any wrongdoing.

Long before America existed, English common law relied on a principle of *rex non potest peccare*, that is, “the King can do no wrong.” This

principle has been implemented by American governments at all levels, making it difficult for anyone to successfully sue the government.

Cases against the government are regularly thrown out by judges due to government's imperialistic immunity. In Utah, if the government is actually held accountable, justice is artificially limited due to caps on compensation. Those harmed by their government face a profound injustice due to immunity laws—and for that reason, the laws need to change.

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Utahns should be able to hold their government accountable when its actions cause them harm.

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It was 1792, a short time after the United States Constitution was adopted, when Alexander Chisholm sued the state of Georgia. The state owed the deceased Robert Farquhar a number of payments for goods he had supplied during the Revolutionary War. As the executor of Farquhar's will, Chisholm was determined to make sure the state paid what it owed. Georgia claimed it was immune from a lawsuit as a sovereign state, but the U.S. Supreme Court disagreed, ruling in favor of Chisholm.

In response to the Court's decision, Congress quickly drafted the 11th amendment to the U.S. Constitution which was ratified in 1794. The amendment reads:

*"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."*

*Seminole Tribe v. Florida* (1996), which granted states immunity from private lawsuits in federal court—meaning state governments became nearly untouchable on the federal level.<sup>2</sup> This decision was soon expanded in *Alden v. Maine* (1999), where it was decided states can also enjoy sovereign immunity from private lawsuits brought on the state court level.<sup>3</sup>

Individual government employees were not protected from suit under sovereign immunity, but were instead held liable for their actions under federal law. People could bring lawsuits against any individual, whether they were employed by the government or not. This was federally reaffirmed when Congress passed the Civil Rights Act of 1871, which was later reformed to ensure that any person living within the country is held responsible to the injured party under a lawsuit.<sup>4</sup>

This law was eventually overturned when the U.S. Supreme Court created the qualified immunity

seeking damages, unless the plaintiff has been injured as a result of a civil rights violation made by a government employee and can prove the employee either was incompetent or knowingly violated the law. It "gives officials breathing room to make reasonable but mistaken judgments."<sup>6</sup> Although qualified immunity is a federal doctrine, many states have adopted their own versions to protect state and local employees.

Qualified immunity is not in the Constitution—it is pure judicial policymaking. It wasn't until the *Harlow* case that the Supreme Court established an official test to determine whether immunity is granted for government employees, thereby standardizing government employee immunity.<sup>7</sup> In addition, a high threshold was established for waiving that immunity.

The *Harlow* decision interpreted "rights" only as "clearly established" statutory or constitutional rights that a reasonable person would have known. This small change of words made a significant difference. In practice, this translates to courts requiring plaintiffs to identify a prior functionally identical case in a relevant jurisdiction that has already been fought successfully in court. If it hasn't been heard, and therefore is not "clearly established," they will be unable to have their case accepted in federal court. This sets an extremely high bar that is unlikely to be reached in most cases, because the chances of finding a successful, identical lawsuit are very low.

One would think that "clearly established" rights would be those that are enshrined in the Constitution or are fundamental to our system of law. Instead, the term has become

**The concept of immunity rests on the idea that "the king can do no wrong," which undermines accountability.**

The new clause effectively overturned the Chisholm decision, creating the doctrine of **sovereign immunity**, which gave states a shield from unwanted lawsuits brought within the federal court system. The U.S. Supreme Court expanded sovereign immunity in *Hans v. Louisiana* (1890), barring individuals from suing their own state in federal court without the state's consent.<sup>1</sup> This was followed by

doctrine in 1982. In a landmark decision in *Harlow v. Fitzgerald*, the justices decided that government employees should enjoy similar immunity protections as government entities do.<sup>5</sup>

## Qualified Immunity

**Qualified immunity** protects government officials from lawsuits

a play on words that has made it easier for government employees to be granted legal protection in a myriad of cases, thus making it harder for harmed individuals to hold bad actors in government accountable.

Consider the following example: Chadrin Mullenix, a trooper with the Texas Department of Public Safety (DPS), shot at a moving vehicle in an attempt to stop Israel Leija, who was trying to escape the police on the night of March 23, 2010.<sup>8</sup> Leija would have been forced to stop because police had set up a spike strip on the highway to prevent the vehicle from getting away. Yet, just before the spike strip, Mullenix positioned himself on an overpass to try to shoot and stop Leija's vehicle. Despite having no official orders to do so, and no training to shoot at a moving vehicle, Mullenix opened fire and shot Leija four times, killing him.

Leija's family sued Mullenix, and the case ended up in the United States Supreme Court with the question of whether the officer was entitled to qualified immunity. In this case, *Mullenix v. Luna*, the court granted qualified immunity to Mullenix—and thus denied any justice to Leija's family—because there was no “clearly established” law explicitly forbidding the use of deadly force on a fleeing suspect.<sup>9</sup>

This case demonstrates the problem with the criteria established in *Harlow*. Because an identical case hadn't been fought and won in court, and the law didn't clearly state not to use force on a fleeing victim, Mullenix was granted immunity; the victim's family had no recourse. If the trial had been allowed to go forward, a jury or judge would have been able to decide on the verdict after a thorough review of



*Qualified immunity was created out of whole cloth by the U.S. Supreme Court*

evidence presented by both sides. Instead, Mullenix's employer, DPS, was left to handle any accountability measures. In this case, it's not clear whether there were any.

Governments at every level have adopted some form of the qualified immunity doctrine, and today, most employees and governments—from local to national—are immune from suit or criminal prosecution. These laws have cleared the path for government to break laws with impunity; harm can be perpetrated by government employees without accountability to the people they are supposed to serve.

### **Immunity from Utahns**

Utah passed its own all-encompassing Governmental Immunity Act (GIA) in 1965 that extends to every branch of and person employed by government.<sup>10</sup> This is a bit different than sovereign immunity because while states are recognized as sovereign entities that can't be sued by outside bodies, their own residents can still sue them. Thus, the GIA was passed

to protect Utah state government entities from lawsuits stemming specifically from Utahns.

From a state's perspective, another problem with sovereign immunity is that it does not cover municipalities. The GIA fixed that by simply removing their liability and ability to be sued in most circumstances. Federal immunity laws and GIA laws are based on the same principle of shielding government and employees, but are each targeted at protecting different levels of government.

Although Utah's immunity laws have been tweaked in the time since, it remains extremely difficult to sue the government or be awarded compensation for costs incurred by a harmful government action.

### **Justice Limited is Justice Denied**

On a snowy morning in January 2011, Diane Berg was driving up an on-ramp when her car began to slide on the slick road. Unfortunately, Utah Department of Transportation (UDOT) workers had plowed the



roads in an unsafe way, so instead of hitting the guardrail, the car slid up onto the ramp-like snowbank, vaulted over the on-ramp wall, and plummeted over the edge, killing Diane.<sup>11</sup>

Diane’s husband was able to prove that her death was a direct result of the state’s negligence, allowing them to proceed with a lawsuit against UDOT. After the family endured years of reliving the terrible incident and hundreds of thousands of dollars in legal fees, the jury reached a verdict. They found UDOT partially responsible for Diane’s death, and awarded the Berg family \$1.3 million in damages, which was later reduced to \$750,000 because they found Diane to be partially responsible for the accident.<sup>12</sup> Yet, even after all the time and money spent in the courtroom, the Berg family only received \$648,500. This was due to a statutory cap on the amount of damages Utah will pay to an individual. It was not nearly enough to cover the damages the family had suffered, including the heavy legal fees incurred along the way.

In hopes of obtaining just compensation, the family presented their case to the Utah Board of Examiners as allowed by law. The Board recommended the Bergs be paid an additional \$45,100 by the Legislature in early 2018.<sup>13</sup> The Board’s decision was a letdown to the family, who were buried in legal debt, amounting to \$1,269,366 from the years spent fighting their case.<sup>14</sup>

This tragic case is a rare example of a government entity being held at least partially responsible for violating another’s rights. The extremely high standard for even being able to bring a lawsuit against the government has only narrow exceptions. Even if a suit

is able to proceed to trial and finds a jury who faults the government, justice is arbitrarily limited; unlike a private entity, the government can only be held liable for up to a certain amount of damages.

## Justice and Accountability

Clearly written into the preamble of the United States Constitution is one of the core functions of American government: “establish justice.”<sup>15</sup> Under our legal system, establishing justice means to seek truth and treat individuals fairly under the rule of law—but what happens when there are different rules for different groups of people?

Governmental immunity prevents certain groups and types of individuals from facing legal accountability. This practice is unfairly exclusionary, only allowing certain qualified people to benefit from a special privilege in the law. While this is the effect, the ostensible purpose sounds

reasonable to many—to prevent frivolous lawsuits that waste taxpayer money and burden the legal system. Although these intentions may be sound, immunity laws are written and interpreted in a way that lets government off the hook even in cases where the government may clearly be violating the law or a person’s rights.

## Immunity Incentives

Humans respond to incentives. While ethics and morality can help shape behavior in a positive way, external forces influence our decision making process—whether we work for a private company, which faces full liability for its actions, or the government, which does not.

If government employees know they probably won’t be held liable for breaking laws or causing harm, what incentive do they have to behave ethically? Current immunity laws effectively create favoritism by putting



*Darrin and Diane Berg and their children*

government's interests above those whom they represent and serve.

Consider the structural failures in government that have led to unintended consequences. For example, it is fundamentally problematic to suggest that the same individuals who create and enforce laws do not have to responsibly abide by them to the same standard as the rest of us. The "rule of law" is a reasonable standard and goal to strive for—but it inherently demands that government be held to the same standard it enforces upon the public. But that standard won't ever be the same so long as the status quo in immunity laws is preserved.

While one can concede that government employees generally have good intentions and behavior, eliminating a natural incentive to deter misconduct is poor policy. This approach is especially frightening considering the power and impact government has across society. There are government owned public gyms and community centers, golf courses, police forces, courts and more. The government's reach has extended far beyond the walls of the Legislature—the responsibility and liability should therefore follow.

## Technicalities

In May of 2005, Springville City workers entered Wade and Sandra Winegar's property without their knowledge or permission in order to clear an obstruction in the Hobble Creek streambed.<sup>16</sup> The city used heavy construction equipment to do the job and ended up damaging the Winegar's property by cutting down nearly 100 trees, removing vegetation, and digging up the streambed—leaving the stream susceptible to

major erosion problems. All of this was done contrary to federal and state environmental laws. Because the city failed to properly address these issues, the Winegars filed a lawsuit.

In order to move forward with a lawsuit against Springville, the Winegars first had to comply with the requirements laid out in the Utah Governmental Immunity Act (GIA). Under the law, the claimants (Winegars) had a one-year statute of limitation to file the claim in court. Before doing this, they were required to deliver a "notice of claim" in a very specific manner to entities they were planning to sue (Springville).

The Winegars waited to hear back from Springville, to see if their claim had been approved (if the city agreed to pay) or denied. Springville City misinformed the Winegars regarding this wait time by telling them the city had 90 days to respond to the notice. If there were no response by the end of the waiting time, the notice of claim would be considered denied and the claimant could move forward to filing the claim in court. The Winegars acted on this knowledge,

only to later discover that state law only allowed 60 days, not 90. In the end, they filed their suit over a month late due to false information provided by Springville.

Four years into the lawsuit, the city decided to use this late claim as a defense, resulting in a judgment in Springville's favor. Both parties could have saved much time and energy in the process if the city had correctly informed the family or raised this claim at the outset of the case. Even worse, the city could have paid for the Winegars' damages several times over with all the taxpayer money it spent litigating the case.

This story highlights two different problems with Utah's GIA. First, the Utah Legislature has set up an extremely stringent and error-prone process for bringing a claim against government entities. The Winegars lost their entire case based on a technicality, allowing Springville to shirk accountability for their erroneous and deceptive actions; other cases can be similarly set aside due to a minor deviation from the notice process. This is a miscarriage of justice that the Utah Legislature has enabled—and it's one that should be fixed.

Second, with only one year to file a claim with the courts, the Winegars and their legal team were unable to adequately research the law and facts of the case. In the legal world, one year is not considered a long time to prepare a significant case—especially when pursuing damages from a large and powerful body like a government entity. While individuals have only one year to file lawsuits against state and local entities, claims against private entities have a four-year statute of limitations for personal

**Eliminating a natural incentive to deter misconduct is poor policy and should be revisited.**

injuries and three years for property damages, giving government another unfair advantage over their private counterparts.<sup>17</sup>

## Conclusion

At present, the courts will not hear an individual's case against the state unless it fits into a narrow set of exemptions.<sup>18</sup>

These immunity protections effectively remove the court's discretion to see justice done; while judges and prosecutors are trusted to make pertinent decisions surrounding constitutional rights every single day, they are somehow not trusted when it comes to government employees and

agencies. These are virtually untouchable under current immunity protections.

Proponents of governmental immunity argue that it is necessary in order to save taxpayers money by ensuring only legitimate cases against government are heard in the courts. They want to prevent frivolous lawsuits from clogging up the court system. While this sentiment may have been a real concern at one point, why not trust the discretion of judges to decide which cases are legitimate? After all, this is how private cases are handled, where the rule of law is just as important to ensure justice is served.

Because it is extremely unlikely that governmental immunity will be abolished outright, Utah needs to reform its laws

to—at a minimum—ensure that public accountability is upheld to the highest degree possible for private citizens who have been wronged by their government.

Shielded from responsibility for wrongdoing, government employees maintain a broad protection that can cause an injustice to occur when they are not held accountable for their harmful actions.

These laws are discouraging for people who have legitimate claims against their own government, and the exceedingly high hurdles may disincentivize them to even pursue a legal remedy at all.

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## PROPOSAL A: YELLOW PAGES TEST

Nonessential government services are services provided by government that could appropriately be provided by the private sector. These government-owned entities have an unfair advantage over their private market competitors. If an individual were to be hurt at the government gym, they would have a much more difficult time pursuing a lawsuit against the responsible party—or may not be able to file a suit at all—due to immunity. To help secure accountability measures and ensure a level playing field, the government should perform a “yellow pages test” whenever a lawsuit against a nonessential government entity comes forward. The test could review how much private competition the nonessential entity has within a given number of miles, among other factors. If it is determined that the business is not an essential government function, then immunity would be waived. This would help to ensure a measure of fairness between government and private business.

## PROPOSAL B: REMOVE DAMAGE CAPS, REQUIRE INSURANCE

Injured parties should be paid what they are owed by the government that harmed them. Currently, the law only allows for an individual to be awarded up to \$745,200 in personal injury fees, and \$295,000 for property damage fees—even if the court finds the government responsible for damages beyond the cap. In a single occurrence, the cap for injury fees to be paid out is \$2,552,000 regardless of how many victims there were. These cap amounts increase every other year based on a calculation set forth in Utah code encompassing the consumer price index and medical service prices. Individuals can ask the Legislature for additional damages, but as was the case with the Berg family, the additional award may not be enough to make them whole.

These caps should be removed. Further, certain government agencies should be required to have something similar to liability insurance. When an individual or business purchases liability insurance, they have an increased incentive to exercise proper caution since their insurance rates will likely increase if they're responsible for an incident. To ensure coverage should they be at fault, many different organizations and professionals purchase insurance as a financial protection. The state should be no different. If government entities and employees were properly insured under this model, the need for government immunity would be greatly reduced.



## PROPOSAL C: LENGTHEN STATUTE OF LIMITATIONS

The current statute of limitations for filing a claim against a Utah governmental employee or entity is one year after the denial of notice of claim has been received by the claimant. For claims brought against private actors, the statute of limitations is four years for personal injuries, and three for property damage. The statute of limitations for claims made against the government should be extended to match the law governing private claims.

## PROPOSAL D: SIMPLIFY NOTICE OF CLAIMS REQUIREMENTS

In order to bring a claim against a government entity or individual, the claimant must first notify the entity of their intent to file a claim in the form of a letter. This letter has extremely precise requirements governing its contents and the timetable for delivery and response. The stringent requirements have caused many claimants to fail due to technical slip-ups, just like the Winegars. Additional case failures due to errors with notices of claim include: *Peeples v. State of Utah* (2004), *Davis v. Cent. Utah Counseling Ctr.* (2006), *Gurule v. Salt Lake County* (2003), *Cedar Prof'l Plaza, L.C. v. Cedar City Corp.* (2006), and *Security Inv. Ltd v. Brown* (2002). There are plenty more examples of legitimate claims that have been ruled against due to slip-ups on this section of requirements.

### Endnotes

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4. "42 U.S. Code § 1983 - Civil action for deprivation of rights," Legal Information Institute, accessed June 28, 2018, <http://www.law.cornell.edu/uscode/text/42/1983>.
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6. *Carroll v. Carman*, Legal Information Institute, accessed July 17, 2018, <http://law.cornell.edu/supremecourt/text/14-212>.
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10. "Chapter 7 Governmental Immunity Act of Utah, Utah Code § 63G," Utah State Legislature, accessed June 1, 2018, <http://le.utah.gov/xcode/Title63G/Chapter7/63G-7.html>.
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14. Damage expenses resulting from accident, via email from Darrin Berg, December 1, 2018.
15. "U.S. Const.," Preamble, 1787.
16. *Winegar v. Springeville City*, 2018, [https://scholar.google.com/scholar\\_case?case=8338432045210224230](https://scholar.google.com/scholar_case?case=8338432045210224230).
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18. Waivers of Immunity, Utah Code § 63G-7-301.

PUBLIC POLICY BRIEF

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FREQUENT  
RECURRENCE  
===== TO =====  
FUNDAMENTAL  
PRINCIPLES IS  
ESSENTIAL  
===== TO =====  
THE SECURITY  
===== OF =====  
INDIVIDUAL  
RIGHTS

UTAH CONSTITUTION  
ARTICLE I, SEC 27